IN THE
SUPREME COURT OF MISSOURI

No. 84624

CHERYL THRUSTON,
FERN WARD,
and
LUANA GIFFORD,

Plaintiffs-Appellants,

v.

JEFFERSON CITY SCHOOL DISTRICT,

Defendant-Respondent.

Appeal from the Circuit Court of Cole County
Hon. Thomas J. Brown III

SUBSTITUTE BRIEF FOR RESPONDENT

Thomas A. Mickes #28555
Paul N. Rechenberg #40615
DOSTER JAMES L.L.C.
17107 Chesterfield Airport Road
Suite 320
Chesterfield, Missouri 63005
Telephone: (636) 532-0042
Facsimile: (636) 532-1082

Thomas C. Walsh #18605
Gerard T. Carmody #24769
Elizabeth C. Carver #34328
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 6

STATEMENT OF FACTS 7

Proceedings Below 10

POINTS RELIED ON 12

ARGUMENT 14

Introduction 14

Standard of Review 15

I. PLAINTIFFS' APPEAL FROM THE DISMISSAL OF THEIR PETITION SHOULD BE DISMISSED AS MOOT 16

II. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE PLAINTIFFS HAVE NOT STATED A JUSTICIABLE CLAIM FOR DENIAL OF COLLECTIVE BARGAINING RIGHTS, AND PLAINTIFF GIFFORD HAS NO STANDING TO SUE 17

III. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE THE RIGHTS THEY SEEK TO ASSERT ARE FORECLOSED BY A STATUTE, THE CONSTITUTIONALITY OF WHICH THEY HAVE NOT PROPERLY CHALLENGED 20

A. Under §105.500 RSMo., Plaintiffs Have No Right to Collective Bargaining or to Present Proposals Through Union Representatives 20

B. Article I, §29 of the Missouri Constitution Does Not Entitle Plaintiffs to the Rights They Seek to Enforce Here 24

IV. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' FIRST AMENDMENT CLAIMS 31

A. The First and Fourteenth Amendments to the United States Constitution Do Not Entitle Plaintiffs to a Union Representative at a Grievance Hearing 31

B. Plaintiff Thruston's First Amendment Rights Were Not Violated by the Alleged Directive Not to Discuss Her Instructional Program Outside the Classroom 32

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

APPENDIX:

Exhibit A to Plaintiffs' Petition A-1

TABLE OF AUTHORITIES

Cases

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992) 22, 23

Alinovi v. Worcester Sch. Comm., 1984 U.S. Dist. LEXIS 19829 (D. Mass. Feb. 2, 1984) 33

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989) 12, 22

Carey v. Aldine Indep. Sch. Dist., 996 F. Supp. 641 (S.D. Tex. 1998).....33

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947).....*passim*

Connick v. Myers, 461 U.S. 138 (1983) 13, 32, 33

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998) 24

Curators of Univ. of Mo. v. Public Serv. Employees Local No. 45, 520 S.W.2d 54 (Mo. 1975).....24, 26, 28

Glidewell v. Hughey, 314 S.W.2d 749 (Mo. banc 1958).....25, 26

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993) 15

Hollis v. Blevins, 926 S.W.2d 683 (Mo. banc 1996).....22, 23

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. banc 1991).....23

Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986).....12, 19

Missouri National Education Ass'n v. Missouri State Bd. of Mediation, 695 S.W.2d 894 (Mo. banc 1985) 21, 25

Pickering v. Board of Educ., 391 U.S. 563 (1968) 13, 32, 33

Sheehan v. Sheehan, 901 S.W.2d 57 (Mo. banc 1995) 16

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979) 13, 31, 32

State *ex rel*. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969) .....*passim*

State *ex rel.* O'Leary v. Missouri State Bd. of Mediation, 509 S.W.2d 84 (Mo. banc 1974) 24

Strasberger v. Board of Educ., Hardin County, 143 F.3d 351 (7th Cir. 1998) 21

Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. banc 1982) 12, 25, 26

Switzer v. Hart, 957 S.W.2d 512 (Mo. App. 1997) 12, 16

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 12, 20

Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo. 1976) 32

Wales v. Board of Educ., 120 F.3d 82 (7th Cir. 1997) 13, 33

Waters v. Churchill, 511 U.S. 661 (1994) 33

Other Authorities

United States Constitution, amend. I .....*passim*

United States Constitution, amend. XIV 8, 10, 12, 31

Missouri Constitution, art. I, §29 .....*passim*

Missouri Constitution, art. V, §10 6

Missouri Public Sector Labor Law, §105.500 et seq. RSMo..... *passim*

§527.110, RSMo. 23

Missouri Supreme Court Rule 87.04..... 23

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g..... 34

National Labor Relations Act, 29 U.S.C. §141 et seq. 21

JURISDICTIONAL STATEMENT

This appeal concerns whether the trial court properly granted Respondent Jefferson City School District's Motion to Dismiss Appellants' Petition. Appellants appealed the trial court's Judgment Order that sustained the Respondent's Motion to Dismiss to the Missouri Court of Appeals for the Western District. On May 14, 2002, the Missouri Court of Appeals for the Western District dismissed the appeal on grounds of mootness. Appellants filed an Application to Transfer the appeal to this Court on July 16, 2002. This Court entered its Order granting appellants' application for transfer on August 27, 2002.

This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

At the time the petition in this case was filed on March 29, 2000, plaintiffs Cheryl Thruston and Fern Ward were employees of Respondent Jefferson City School District (the "District"), and plaintiff Luana Gifford was President of the Missouri Federation of Teachers and School Related Personnel, AFT-AFL-CIO (L.F. 2, 3, 9, 12). Thruston's one-year contract to teach in the District expired May 30, 2000, and was not renewed (L.F. 2). Ward's contract to serve as a principal at another school in the District likewise ended on May 30, 2000, and was not renewed (L.F. 9).

Plaintiffs' petition alleges that Ms. Thruston and her "representative," Ms. Gifford, went to a meeting in late October 1999, in the District's Administrative Offices "to apprize the District of problems in her classroom for which District assistance was requested" (L.F. 3). Thereafter, they allege, Thruston's principal "became antagonistic and confrontational" with her in several respects, including insisting that she watch training movies after school, asking her repeatedly whether she wanted to resign, instructing her to speak positively to her behavior-disordered students, and giving her job targets (L.F. 4-6).

Thruston filed a Grievance Form A that states it was filed December 1, 1999, but which references meetings held December 2 and December 8, 1999, and is signed December 14, 1999 (L.F. 14; Apdx A-1). The Grievance Form signed by Ms. Thruston states that "E.R. Dalrymple, representing Missouri Federation of Teachers, attended the December 2nd and December 8th meetings with me" (L.F. 14; Apdx A-1). The "major concerns" stated in the grievance were:

"1. Students are in a very restrictive environment and [behavior disordered] students should not encounter this.

2. Harassment – Teacher was asked if she wanted to resign on the following dates: 11/4/99, 11/8/99 and 11/23/99.

3. 'Gag Order' – Teacher's First Amendment rights were violated on 11/8/99 when teacher was told not to discuss her ['Behavior-Disordered] Program' (not told to not discuss her students) with anyone.

4. Report not yet received from Dr. Markway concerning his evaluation of classroom structure.

5. Freedom of Association – 10/25/99 meeting in central office and 10/26/99 meeting at Southwest Elementary.

6. Job Target" (L.F. 15).

Thruston alleges that "her rights to organize and collectively bargain through a representative of her own choosing" under Article I, §29 of the Missouri Constitution, and her "rights to Freedom of Association and Freedom of Speech under the First and Fourteenth Amendments of the U.S. Constitution" were abridged "by virtue of the fact that her job was jeopardized through the establishment of . . . performance-based teacher evaluation job targets only after her affiliation and activity with the Missouri Federation of Teachers" was made known to the District through "the presence of her

chosen representative, Plaintiff Gifford" at meetings with District officials (L.F. 7-8). Thruston further alleges that her rights under the First Amendment and §29 were also abridged when District officials instructed her not to discuss her job or her behavior-disordered program with anyone, and when District officials "repeatedly inquired as to whether she wanted to resign her job" following the meeting at which Gifford represented her in October 1999 (L.F. 8-9).

In her prayer for relief, Thruston seeks an Order "declaring the conduct of Defendant School District in violation of her rights to collectively bargain and organize through a representative of her own choosing" under §29 and the First Amendment, and asks that the District "be specifically directed to cease and desist from said abridgement" of her rights (L.F. 9).

Plaintiff Ward alleges that after serving as a principal in the District for "many years," she was informed in February 2000 that her contract "would [not] be renewed," and that her duties were severely limited from March 2000 to the end of the school year (L.F. 9). She was denied the opportunity to file a grievance, and to select Ms. Gifford as her representative to "resolve outstanding issues with the District" (L.F. 9-10). Ms. Ward alleges that the District's denial to her of an opportunity to pursue a grievance limited both her rights under Article I, §29 to organize and collectively bargain through a representative of her own choosing as well as her rights under the First Amendment (L.F. 10). Ms. Ward's prayer for relief is identical to Ms. Thruston's, with one exception: she originally sought $350,000 in damages on her claim that the District defamed her, but subsequently voluntarily dismissed without prejudice her "claims referencing defamation,

loss of reputation and damages resulting" from the conduct of the School District (L.F. 11, 33).

Ms. Gifford alleges that her rights of freedom of association and freedom of speech under the First and Fourteenth Amendments were abridged and limited by the "job threatening conduct undertaken by Defendant School District" following her meeting with Ms. Thruston and District officials, and by the District's denial to her of the right to represent Ward in her grievance (L.F. 12). She seeks an Order declaring that the District abridged her rights under the First and Fourteenth Amendments "by denying her right to associate with, speak on behalf of, and represent Plaintiffs Thruston and Ward" (L.F. 12).

Proceedings Below

The School District filed a Motion to Dismiss the petition, which was granted in full by Judgment, Decree, and Order dated June 18, 2001 (Br. A-11).[1/] The Circuit Court for Cole County held that as public employees, Thruston and Ward had no collective bargaining rights under Article I, §29, citing City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947) (Br. A-7-A-8). The court likewise held that the First Amendment did not protect the speech at issue in the petition, and that Gifford had no standing to assert a constitutional claim against the District (Br. A-10-A-11).

1/ The reference to "Br." is to the "Brief of Appellant" [sic] filed in the Missouri Court of Appeals, Western District, No. WD 60172. The appendix to that brief is referred to as "Pl. Apdx _." The appendix to this brief is referred to as " Apdx _."

Plaintiffs appealed the dismissal of their claims to the Court of Appeals, Western District, which affirmed the circuit court, but on different grounds. The Court of Appeals held that Thruston's and Ward's claims became moot when their contracts with the District expired, and were not renewed (Slip Op. 4). Because Gifford's claims are derivative of her co-plaintiffs', the court dismissed them as well (Slip Op. 4).

Plaintiffs' Application for Transfer to this Court was granted on August 27, 2002. Despite the fact that their brief to the Court of Appeals did not address the mootness issue relied on by that court, plaintiffs have not filed a Substitute Brief in this Court. In their brief to the Court of Appeals, plaintiffs Thruston and Ward withdraw somewhat from the global allegation in their petition that Article I, §29 provides them the rights to collectively bargain and organize through a representative of their own choosing. They characterize their claims variously as seeking "limited collective bargaining rights" (Br. 19); "only seek[ing] confirmation of the terms and conditions of employment under annual teacher and administrator contracts freely granted by Respondent School District" (Br. 17); and "attempting to negotiate and grieve over mid-term changes in their contractual terms and conditions of employment" (Br. 25). They acknowledge that as public employees, they do not have the right to strike or to "bargain over wages or other matters where legislative appropriation not previously obtained is required" (Br. 18), and state that they are not "attempt[ing] to compel Respondent School District to enter a binding contract which it cannot alter" (Br. 21).

POINTS RELIED ON

I. PLAINTIFFS' APPEAL FROM THE DISMISSAL OF THEIR PETITION SHOULD BE DISMISSED AS MOOT.

Switzer v. Hart, 957 S.W.2d 512 (Mo. App. 1997).

II. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE PLAINTIFFS HAVE NOT STATED A JUSTICIABLE CLAIM FOR DENIAL OF COLLECTIVE BARGAINING RIGHTS, AND PLAINTIFF GIFFORD HAS NO STANDING TO SUE.

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947);

Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986);

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

III. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE THE RIGHTS THEY SEEK TO ASSERT ARE FORECLOSED BY A STATUTE, THE CONSTITUTIONALITY OF WHICH THEY HAVE NOT PROPERLY CHALLENGED.

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989);

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947);

State *ex rel*. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969);

Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. banc 1982);

Missouri Constitution, Article I, §29;

Missouri Public Sector Labor Law, §105.500 et seq. RSMo.

IV. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' FIRST AMENDMENT CLAIMS.

Connick v. Myers, 461 U.S. 138 (1983);

Pickering v. Board of Educ., 391 U.S. 563 (1968);

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979);

Wales v. Board of Educ., 120 F.3d 82 (7th Cir. 1997);

United States Constitution, amend. I;

United States Constitution, amend. XIV.

ARGUMENT

Introduction

Plaintiffs' claims suffer from a number of defects which prevent them from being appropriate for review by this Court. As the Western District correctly determined, their claims were rendered moot when the contracts of Teacher Thruston and Principal Ward terminated without renewal. Because they are no longer employed by the District, they are not entitled to the relief they seek, nor does Ms. Gifford have any right to represent them.

Further, plaintiffs have not stated a justiciable claim for denial of collective bargaining rights, as none of them ever asked the District to engage in collective bargaining with regard to wages, hours, working conditions, or other issues on behalf of the teachers in the District. Instead their allegations involve individual "concerns" voiced by Thruston and Ward about their respective employment conditions. They thus lack standing to assert the broad-brush allegations in their petition that they have been denied the right to bargain collectively.

Plaintiffs' claims suffer from still another shortcoming. Although the relief they seek is available only if §105.510[2/] is invalidated, plaintiffs have not preserved any challenge to the constitutionality of that statute, as required by this Court's decisions. Nor does the record reflect that plaintiffs have given the requisite notice of their implicit challenge to §105.510 to the Attorney General.

[2/] All statutory references are to RSMo. (1994) unless otherwise indicated.

Even if this Court were to determine that plaintiffs can overcome these substantial procedural hurdles and are entitled to a review of the merits of their claims, plaintiffs face an additional insurmountable obstacle: §105.510 provides limited "meet and confer" rights to public employees, but specifically excludes teachers, like Ms. Thruston, and has been interpreted by this Court to exclude administrators, such as Ms. Ward, as well. Although plaintiffs claim that Article I, §29 of the Missouri Constitution grants all public employees the right to collectively bargain, this Court has held, on no fewer than five occasions, that §29 does not apply to public employees.

The Missouri General Assembly has routinely rejected attempts to legislate the collective bargaining rights sought by plaintiffs. Granting teachers – and by necessary extension all other public employees – the right to collectively bargain would fundamentally alter the concept of separation of powers. Local governments, elected by the people, would be deprived of control of the most critical aspects of their governance, finance, and operations. The Missouri Constitution provides for constitutional amendment and for regularly mandated review of its own provisions. That mechanism – not the present request to overrule repeated and consistent holdings of this Court – is the proper vehicle for consideration of whether public employees should acquire the right to bargain collectively.

Standard of Review

A motion to dismiss for failure to state a claim may be sustained when the petition fails to allege facts essential to recovery. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). In determining

whether sufficient facts exist, the petition is broadly construed in plaintiff's favor, with all allegations and reasonable inferences accepted as true. Sheehan v. Sheehan, 901 S.W.2d 57, 58 (Mo. banc 1995). Even construing the facts most favorably to plaintiffs, the trial court properly dismissed plaintiffs' petition for failure to state a claim upon which relief can be granted.

I. PLAINTIFFS' APPEAL FROM THE DISMISSAL OF THEIR PETITION SHOULD BE DISMISSED AS MOOT.

Each of the plaintiffs requests injunctive relief requiring the District to take certain actions in connection with the employment of plaintiffs Thruston and Ward. Since the action was filed, however, Thruston and Ward have terminated their employment with the District as their respective contracts expired. Hence, as discussed cogently by the Western District, their claims for injunctive relief are moot because no relief can be awarded to them that would redress their alleged injury. Viewed another way, they lack standing because they no longer have any right to the relief they seek. Switzer v. Hart, 957 S.W.2d 512 (Mo. App. 1997).

The District is hard-pressed to improve on the mootness analysis by the Court of Appeals, and since plaintiffs have not addressed it by filing a substitute brief, the District will simply rely on that opinion.

II. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE PLAINTIFFS HAVE NOT STATED A JUSTICIABLE CLAIM FOR DENIAL OF COLLECTIVE BARGAINING RIGHTS, AND PLAINTIFF GIFFORD HAS NO STANDING TO SUE.

Plaintiffs' position in this case is an opaque amalgamation of confusing contradictions. What is clear is that none of the plaintiffs ever requested the Respondent School District to engage in collective bargaining with regard to wages, hours, fringe benefits, and working conditions on behalf of the teachers in the District. At most, plaintiff Thruston sought to participate in a meeting with her school principal to discuss her "concerns" about her school (L.F. 15) and to bring plaintiff Gifford — an official of the Missouri Federation of Teachers — with her.[3/] Plaintiff Ward alleges that she "attempted to select a representative of her choosing, Plaintiff Gifford, to attempt to resolve outstanding issues with Defendant School District, but was refused the opportunity to do so," and that she "attempted to file a grievance under Defendant School District policies, but was denied her opportunity to do so" (L.F. 9-10 ¶¶ 8-9).

[3/] This aspect of the case is especially perplexing in that the record shows that another representative from the Federation – E.R. Dalrymple – attended both meetings with the principal, presumably at Ms. Thruston's request (L.F. 14). Also, paragraph 23 of the petition alleges that plaintiff Gifford did attend at least one meeting with Thruston and "Defendant School District officials" (L.F. 8).

Although plaintiffs characterize their complaints as "grievances," the record does not indicate the provisions of the District's grievance procedure that were invoked or whether plaintiffs' contracts (which are not in the record) provided for some kind of audience for what plaintiffs call grievances. On the basis of these skimpy allegations, Thruston conclusorily alleges that she "had her rights to organize and collectively bargain through a representative of her own choosing abridged" (L.F. 7 ¶ 6). Ward claims the actions of her school board "deprived her of her rights to organize and collectively bargain through a representative of her own choosing" (L.F. 10 ¶ 13).

Plaintiffs never requested their employer to permit them to "bargain collectively" on behalf of a group or union of teachers. Each was instead engaged in registering individual "concerns" about her particular employment conditions. Nevertheless, their petition refers summarily to collective bargaining, and their brief repeatedly characterizes defendant as having refused to bargain collectively but also suggests that plaintiffs are seeking less comprehensive relief (Br. 14-16, 17-18, 20). Yet they ask this Court to overrule City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947), and its progeny, thereby extending the right "to bargain collectively through representatives of their own choosing" under Art. I, § 29 to public sector employees (Br. 17).

Plaintiffs cannot accuse the District of refusing to bargain collectively when they never made a demand for collective bargaining. Plaintiffs seek to parlay the District's supposed refusal to allow their chosen representative to attend meetings and its refusal to acquiesce in their "concerns" into a denial of collective bargaining, but no

amount of creative advocacy can bridge the chasm between the alleged facts of this case and a denial of collective bargaining. Indeed, § 105.510, discussed below, recognizes the distinction between the right to "meet and confer" and the right to bargain collectively. Since a plaintiff has standing only to complain of wrongs committed by the defendant against her, the petition should be dismissed to the extent it seeks a ruling requiring defendant to bargain collectively. Even if, arguendo, this case is not moot, the claims of Thruston and Ward, if not dismissed in their entirety, should be confined to the issue whether the alleged refusal of the District to allow plaintiff Gifford to attend meetings to discuss their concerns states a cause of action for violation of their rights.

As for plaintiff Gifford, she has no standing individually to assert the claims set forth by her in Count III. She maintains that the District denied her the right to represent Ward in a grievance proceeding and that her opportunity to represent Thruston was "chilled" as a result of job-threatening conduct against Thruston. In order to have standing, she must show that she has an actual and justiciable interest susceptible of protection. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 400 (Mo. banc 1986). As will be discussed below, neither Thruston nor Ward had any right to the assistance of a union representative under § 105.510, and since the constitutionality of that statute has not been challenged, Gifford has no protectible interest at stake here.

Moreover, while a union in proper circumstances may have standing to assert certain rights on behalf of its members, Gifford, as an individual, does not. Even if teachers had the right to union participation in grievance resolution, Gifford would have no personal claim to that role. She has not asserted an actual, concrete injury beyond a

generalized grievance and thus has no standing. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-76 (1982).

III. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' PETITION BECAUSE THE RIGHTS THEY SEEK TO ASSERT ARE FORECLOSED BY A STATUTE, THE CONSTITUTIONALITY OF WHICH THEY HAVE NOT PROPERLY CHALLENGED.

A. Under §105.500 RSMo., Plaintiffs Have No Right to Collective Bargaining or to Present Proposals Through Union Representatives.

Whether plaintiffs' petition is construed as an unpleaded claim for union assistance during the grievance procedure or as a foundationless claim of entitlement to collective bargaining, it is squarely foreclosed by statute. Sections 105.500 et seq. provide in unambiguous terms that plaintiffs have no entitlement to the rights they seek to assert here. That statutory scheme, known as the Missouri Public Sector Labor Law, states in relevant part as follows:

> "Employees, *except* police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, *all teachers of all Missouri schools*, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the

representative of their own choosing." §105.510 (emphasis added).

Section 105.510, then, unquestionably precludes not only the claim framed by the facts of this case – union assistance – but also plaintiffs' broader, unpreserved request for a declaration that the District acted in "violation of [their] rights to collectively bargain and organize through a representative of [their] own choosing under Article I, Section 29 of the Missouri Constitution" (L.F. 9, 11). That statute recognizes only limited rights on behalf of public employees in this State, and expressly excludes teachers. State *ex rel.* Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969) ("Sections 105.500 et seq. . . . do not purport to give to public employees the right of collective bargaining guaranteed by Section 29, Article I . . . . The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached"). This Court has unanimously upheld the constitutionality of § 105.510. See, e.g., Cabool, 441 S.W.2d at 41.[4/] The Court has also determined that school administrators, such as Principal Ward, are excluded from the rights conferred by §105.510. Missouri National Education Ass'n v. Missouri State Bd. of Mediation, 695 S.W.2d 894, 897-900 (Mo. banc 1985).

[4/] Public sector employees are specifically excluded from coverage under the National Labor Relations Act, 29 U.S.C. § 141 et seq. Thus, teachers do not have any federal right to union assistance during the grievance procedure. Strasburger v. Board of Educ., Hardin County, 143 F.3d 351, 359-60 (7th Cir. 1998).

Neither plaintiffs' petition nor their Brief to the Court of Appeals expressly challenges the constitutionality of § 105.510, but in reality plaintiffs can obtain the relief they seek only if that statute is declared invalid. This Court may not address the constitutionality of §105.510 at this procedural juncture, though, because plaintiffs have taken none of the required steps to launch a challenge to the constitutionality of a statute. This Court has repeatedly held that "[c]onstitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure." Hollis v. Blevins, 926 S.W.2d 683, 683 (Mo. banc 1996) (holding that defendant waived challenge to validity of joint and several liability statute by failing to raise issue in his answer to petition); see also Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907-08 (Mo. banc 1992) (holding that plaintiffs had failed to preserve for appellate review constitutional challenges to statute because challenges were not raised at earliest opportunity). As the Court announced in Callier v. Director of Revenue, 780 S.W.2d 639, 641 (Mo. banc 1989):

> "A constitutional issue is raised only when presented in accordance with rules of long standing. . . .
>
> "'To properly raise a constitutional question, plaintiffs are required to: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing

the violation; and (4) preserve the constitutional question throughout for appellate review.'" (Citations omitted.)

Plaintiffs have utterly failed to comply with any of these requirements, thereby waiving their implicit challenge to §105.510. Their petition does not mention §105.510 at all, and their brief to the Court of Appeals expressly states that they "are not asserting coverage by the meet and confer law of Chapter 105.500, et seq., which does not cover teachers" (Br. 25). But §105.510 squarely precludes the claim asserted here, however characterized, and since plaintiffs have not properly preserved any challenge, constitutional or otherwise, to §105.510, this Court should affirm the dismissal of their claims or retransfer this case to the Court of Appeals. See, e.g., Hollis, 926 S.W.2d at 684; Adams, 832 S.W.2d at 908.[5/]

[5/] Plaintiffs' procedural deficiencies are compounded. Both Supreme Court Rule 87.04 and §527.110 require that "[i]n any proceeding . . . [in which a] statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard." "In actions for declaratory judgment that challenge the constitutionality of a statute, our law follows the general rule that notice to the Attorney General is mandatory." Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 507 (Mo. banc 1991). The record does not indicate that plaintiffs gave the required notice to the Attorney General.

Even if plaintiffs had not waived their right to challenge the validity of §105.510, the constitutionality of that statute, as noted, has already been addressed and upheld by this Court. Cabool, 441 S.W.2d at 41. This Court "should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of a recurring injustice or absurd results." Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. banc 1998). In addition to reviewing the constitutionality of §105.510 in Cabool, this Court has had several other occasions to consider the statute and its application, without suggesting that the statute works an injustice or leads to "absurd results." See, e.g., Curators of Univ. of Mo. v. Public Serv. Employees Local No. 45, 520 S.W.2d 54 (Mo. banc 1975); Cabool, 441 S.W.2d 35; State *ex rel.* O'Leary v. Missouri State Bd. of Mediation, 509 S.W.2d 84 (Mo. banc 1974). Even if the constitutional issue had been properly preserved, no reason exists for revisiting the constitutionality of §105.510 here.

Plaintiffs should direct their concerns to the General Assembly. Their invitation to this Court to sit as a super-legislature and to override the will of elected representatives should be recognized for what it is and rejected.

B. Article I, §29 of the Missouri Constitution Does Not Entitle Plaintiffs to the Rights They Seek to Enforce Here.

To the extent plaintiffs argue that the rights they assert here emanate from Article I, §29 of the Missouri Constitution, that contention was long ago rejected by this Court. Article I, §29 provides that "employees shall have the right to organize and to

bargain collectively through representatives of their own choosing." In City of Springfield v. Clouse, 206 S.W.2d 539, 542 (Mo. banc 1947), the Court addressed whether §29 applied to public employees, and unanimously answered that question in the negative: "[W]e must rule that Section 29 does not apply to any public officers or employees."

Plaintiffs have not proposed a single argument that has not already been considered and dismissed by this Court. Starting with Clouse and continuing with Glidewell v. Hughey, 314 S.W.2d 749 (Mo. banc 1958), Cabool, Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. banc 1982), and Missouri National Education Ass'n, this Court has consistently and historically ruled that public employees do not have the right to collectively bargain.

As plaintiffs correctly point out, the Court recognized in Clouse that "[a]ll citizens have the right, preserved by the First Amendment to the United States Constitution and [provisions of the Missouri Constitution], to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body." Id. at 542. But the Court distinguished between those rights and the rights of collective bargaining. Id. at 543-44. Because the "whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers," which cannot be delegated, public employment cannot be the subject of bargaining and contract. Id. at 545-46.

> "[Section 29] can only be construed to apply to employees in private industry where actual bargaining may be used from

> which valid contracts concerning terms and conditions of work may be made. It cannot apply to public employment where it could amount to no more than giving expression to desires for the lawmaker's consideration and guidance. For these fundamental reasons, our conclusion is that Section 29 cannot reasonably be construed as conferring any collective bargaining rights upon public officers or employees in their relations with state or municipal government." Id. at 545-46.

The Clouse opinion was therefore deeply rooted in the doctrine of Separation of Powers, and this Court has repeatedly reaffirmed its conclusion in Clouse that, unlike private employees, public employees do not have the right to bargain collectively. See, e.g., Glidewell, 314 S.W.2d at 756; Sumpter, 645 S.W.2d at 361; Cabool, 441 S.W.2d at 41, 42; Curators of Univ. of Mo., 520 S.W.2d at 56-57. Thus, more than 25 judges of this Court through the years have endorsed the holding and the reasoning of Clouse.

Plaintiffs challenge the holding in Clouse, claiming the right under Article I, §29 to "organize and bargain collectively through chosen representatives" (Br. 18). At times, though, they characterize the rights they seek as "limited collective bargaining rights" (Br. 19), which they do not fully define but which apparently include all rights short of the right to strike, the "right to bargain over wages or other matters where legislative appropriation not previously obtained is required," and the right to compel the employer "to enter a binding contract" (Br. 18, 21). Their brief is thus at odds with their petition.

They argue first that the Court in Clouse failed to give ordinary meaning to the term "employees" as used in §29 (Br. 15, 17, 20). But this argument ignores the thorough analysis by the Court in Clouse regarding the irreconcilable tension between the recognition of collective bargaining rights in public employees and other constitutional and statutory provisions of long standing, most notably those conferring to the legislature matters of compensation, tenure, and working conditions of public employees. 206 S.W.2d at 544-45. The Court concluded that it was "inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority." Id. at 545.

Plaintiffs also suggest that the Court's statement in Clouse that "the process of collective bargaining, as usually understood, cannot be transplanted into the public service" has been out-moded by "subsequent developments [which] have provided a changed definition of public employee collective bargaining in the public sector" (Br. 18). The only "subsequent development" they point to is the 1962 issuance of Executive Order Number 10988, "Employee-Management Cooperation in the Federal Service" by President Kennedy, which they say "devised a form of collective bargaining [for federal employees,] not as usually understood in the private sector, but as would work in the public sector" (Br. 20). The Executive Order provides federal employees "the right through their formally-recognized employee organizations to consult with the organization 'in the formulation and implementation of personnel policies and practices, and matters effecting working conditions that are of concern to its members'" (Br. 19, quoting Pl. Apdx A-2).

The "modern" approach to collective bargaining in the public sector that plaintiffs say is reflected in Executive Order Number 10988 is similar to the "meet and confer" rights granted in the Missouri Public Sector Labor Law, §105.500 et seq. That law was enacted in 1965 – well after Clouse, after issuance of Executive Order Number 10988, and presumably after the so-called "modern definition of collective bargaining" was developed – and specifically excludes teachers from its terms. The exclusion of certain classes of public employees, including teachers, was upheld as constitutional in Cabool, 441 S.W.2d at 43. As explained above, plaintiffs have not expressly challenged the validity of §105.510, nor have they preserved that issue for review by this Court. It is not this Court's function to attempt to rewrite §105.510 by judicial fiat to broaden either the classes of public employees entitled to "[the] procedure for communication" provided therein, id. at 41, or the rights afforded to those employees. See Curators of Univ. of Mo., 520 S.W.2d at 58 ("The General Assembly of Missouri may see fit in the future to amend the Public Sector Labor Law and to extend its requirements beyond the boundaries set in Clouse . . . . If so, and an attack on the constitutional aspects of the Clouse holding is made, we will consider the questions at that time. We need not, and should not, attempt to resolve them now").

Although plaintiffs at times assert that they "merely [want] to negotiate and discuss changes in their working conditions which involved bargaining collectively through representatives of their own choosing" (Br. 22), the concept of "limited bargaining" they champion is a strange one – a teacher cannot grieve in a vacuum. The whole purpose of a "grievance" is to alter the employment relationship. Granting even

the "limited bargaining" rights sought by plaintiffs would run afoul of Clouse, in which this Court plainly held that "qualifications, tenure, compensation and working conditions of public . . . employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract." 206 S.W.2d at 545. Plaintiffs have not identified any other source for the rights they assert here.[6/]

To the extent that plaintiffs are implicitly arguing that Article I, §29 invalidates §105.510, that claim was not properly asserted and, in any event, would require the overruling of both Clouse and Cabool.

The Court should consider the practical implications of the ruling plaintiffs seek. First, all public school teachers at every level in the State of Missouri would be permitted to collectively negotiate the terms of their employment contracts without the knowledge or consent of their ultimate employer – the Missouri General Assembly. This bargaining would presumably encompass issues from hiring, firing, salaries, and wages, to school schedules, curriculum, staffing, class size, and even tenure. Grievances would

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[6/] Plaintiffs' reliance on the New York and Florida Constitutions is misplaced. They do not cite a single New York case holding that public employees have the right to use a union representative in a grievance hearing. Florida's Constitution, in marked contrast to Missouri's, explicitly provides certain bargaining rights to private employees and different rights to public employees. Neither the case law nor the constitutions of these or any other states provide any guidance to this Court in its interpretation of Article I, §29 of the Missouri Constitution.

be filed over the most trivial of disputes, and school policy would often be dictated by arbitrators. Can the right to strike be far behind? Who will pay for all of this?[7/]

Secondly, these rights to bargain collectively would necessarily be extended to all other categories of public employees such as police officers, firefighters, state highway patrolmen, National Guardsmen, EMS technicians, deputy sheriffs, and even law clerks. This would not only lead to governmental chaos and gridlock, but would also threaten both the security and the financial stability of the State.

Plaintiffs have not come close to making a case for such drastic, revolutionary action, and have failed to cite a single Missouri case that has even hinted or suggested that Clouse should be revisited, overruled, or "limited," as plaintiffs argue. Because plaintiffs have not stated a cognizable claim, the dismissal of their petition should be affirmed.

[7/] The notion that all teachers favor collective bargaining is resoundingly dispelled by the amicus brief filed by the Missouri State Teachers Association, in which the largest teacher organization in this State convincingly demonstrates that plaintiffs are advocating bad policy as well as bad law.

IV. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' FIRST AMENDMENT CLAIMS.

A. The First and Fourteenth Amendments to the United States Constitution Do Not Entitle Plaintiffs to a Union Representative at a Grievance Hearing.

Plaintiffs also argue that "their rights to freedom of association, speech and assembly under the First and Fourteenth Amendments of the United States Constitution" also entitled Ward and Thruston to pursue their grievances through their chosen representative, Gifford.[8/] The United States Supreme Court has rejected this contention, holding that "the First Amendment is not a substitute for the national labor relations laws." Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464 (1979). The Court recognized that "[t]he public employee surely can associate and speak freely and petition openly," but declared that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." Id. at 465. "Far from taking steps to prohibit or discourage union membership or association, all that the [State Highway] Commission has done in its challenged conduct is simply to ignore the union. That it is free to do." Id. at 466.

8/ Again it should be noted that plaintiffs' own pleadings reflect that Gifford attended one meeting and another Federation representative, Dalrymple, attended two others.

The only case plaintiffs cite to support their alleged rights under the First Amendment is Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo. 1976). But in Vorbeck, St. Louis City and County took the extraordinary step of prohibiting their police officers from even joining a union. Consistent with the later pronouncement by the Supreme Court in Smith, the federal district court held that that prohibition violated the officers' First Amendment rights of association. Vorbeck is thus easily distinguishable from this case, as it did not involve the right to a chosen representative at a grievance hearing, and plaintiffs here were not denied the right to join a union.

B. Plaintiff Thruston's First Amendment Rights Were Not Violated by the Alleged Directive Not to Discuss Her Instructional Program Outside the Classroom.

Plaintiff Thruston also claims that her rights under the First Amendment to the United States Constitution were abridged in that she was told not to "discuss any portion of her behavior disordered instructional program or the application of that program with anyone outside the classroom, including Plaintiff Gifford" (L.F. 8-9). This claim was likewise properly dismissed, as Thruston cannot establish that the supposed infringement of her speech is protected under the First Amendment.

Whether a public employee's speech is protected under the First Amendment depends first on whether the expression in question is upon a matter of "'public concern.'" Connick v. Myers, 461 U.S. 138, 143 (1983) (quoting Pickering v. Board of Educ., 391 U.S. 563 (1968)). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the

community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S. at 146. See also Waters v. Churchill, 511 U.S. 661, 668 (1994). When an employee speaks "upon matters only of personal interest," the First Amendment is not implicated. Connick, 461 U.S. at 147.

As the trial court properly noted, Thruston's vague allegation that she was directed not to discuss her students or their behavior with anyone, including her "union" representative, does not constitute a matter of public concern. Courts have rejected similar attempts by teachers to "constitutionalize" their personal grievances, id. at 154, by seeking judicial review of their employers' handling of their complaints. See, e.g., Alinovi v. Worcester Sch. Comm., 1984 U.S. Dist. LEXIS 19829 (D. Mass. Feb. 2, 1984) (teacher's complaints about her problems with classroom behavior of special needs students is personnel problem, not a matter of public concern); Wales v. Board of Educ., 120 F.3d 82 (7th Cir. 1997) (complaints by teacher regarding her difficulties in teaching special needs students did not constitute protected speech, although they had some elements of public concern); Carey v. Aldine Indep. Sch. Dist., 996 F. Supp. 641 (S.D. Tex. 1998) (teacher's complaints about class size and supplies did not pertain to matters of public concern, but were focused on impact to her).

Even assuming Thruston had adequately alleged that she engaged in protected speech, Pickering further requires that her interests in commenting upon a matter of public concern be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391

U.S. at 568. Thruston has alleged no facts that would demonstrate that any potential speech of hers outweighs the interests of the District in protecting the privacy of its behavior-disordered students. This factor is of particular importance in light of the federal privacy requirements imposed upon school districts under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g. The dismissal of plaintiffs' First Amendment claims should therefore be affirmed.

CONCLUSION

The appeal should be dismissed as moot; alternatively, the Order of the circuit court dismissing plaintiffs' petition should be affirmed.

Respectfully submitted,

Thomas A. Mickes #28555
Paul N. Rechenberg #40615
DOSTER JAMES L.L.C.
17107 Chesterfield Airport Road
Suite 320
Chesterfield, Missouri 63005
Telephone: (636) 532-0042
Facsimile: (636) 532-1082

Thomas C. Walsh #18605
Gerard T. Carmody #24769
Elizabeth C. Carver #34328
BRYAN CAVE LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020

Johnny K. Richardson #28744
Brydon, Swearengen & England, P.C.
312 E. Capital
Jefferson City, Missouri 65101
Telephone: (573) 635-7166
Facsimile: (573) 635-3847

Attorneys for Respondent

CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Rule 84.06(b)(1). The foregoing brief contains 7,366 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(g) has been scanned for viruses and is virus-free.